No. 349.
Motion to dismiss or affirm &c.

Office Supreme Court
FILED
NOV 19 1900
JAMES H. McKENNEY,

Filed Nov. 19, 1900.

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In Supreme Court of United States.

October Term, 1900.

Missouri, Kansas and Texas Railway Company of Texas

vs.

Mollie F. Ferris, et al.

Defendants in Error's Motion to Dismiss Writ of Error or to Affirm Judgment.

J. W. PARKER,
Counsel for Defendants in Error for the purposes of these motions.

AUSTIN EVENING NEWS PRINT

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Defendants in Error's Motion to Dismiss Writ of Error or to Affirm Judgment.

Come now the defendants in error herein, by their counsel appearing in that behalf, and move the Court to dismiss the writ of error in the above entitled cause for want of jurisdiction, because the judgment or decree to which the said writ was allowed is the judgment or decree of the Court of Civil Appeals for the Third Supreme Judicial District of the State of Texas, being the highest court of law or equity of the State in which a decision could be had in said cause; and while the said judgment or decree determined adversely to the plaintiff in error the question of the federal constitutionality of the amendment of April 22, 1897, of the act of February 15, 1858, regulating the taking of depositions of parties, which provides that either party to a suit may propound interrogatories to the other without notice or service of copies, and, further, that in case the party refuse to answer or answer evasively, the interrogatories shall be taken

as confessed, the amendment providing that where either party is a corporation neither shall have the right to take depositions *ex parte*; the same time there were determined adversely to plaintiff in error other questions raised in the case, which were not federal in character—namely, whether the minor plaintiffs Sam and Frank Ferris, aged respectively 14 and 12 years, who sued by next friend and against whom the interrogatories were asked to be taken as confessed, refused to answer said interrogatories, or, if they did, whether such refusal was willful—the rule in Texas, as laid down by its courts of last resort in construing the said deposition statute, being that in order to entitle a party to have interrogatories propounded to his adversary taken as confessed against him for refusing to answer the refusal must have been willful—and the further question whether infants are within the general terms of the statute; and the decision of said questions favorably to defendants in error is sufficient to sustain the judgment or decree without regard to the Federal question.

Plaintiff in error in its assignment of error presents only the part of the bill of exceptions showing the proceedings had when the court ruled on its motion to take the interrogatories as confessed, which exhibits the federal question, and omits the portion of the bill which shows the facts which would sustain the court's action upon the grounds which were not federal.

The following is the bill of exceptions. From the star to the end is the part presenting the state grounds:

"Plaintiffs introduced as a witness in their behalf Sam Ferris, one of the parties plaintiff herein, and he was duly sworn to testify in this behalf, whereupon the defendant objected to such testimony upon the ground that witness had refused to answer *ex parte* interrogatories propounded to him by defendant, and thereupon defendant offered in evidence the following interrogatories to said Sam Ferris and Frank Ferris, plaintiffs, which were accompanied by commission

regularly issued under the provisions of chapter 3, title 40, of the Revised Civil Statutes, relating to *ex parte* interrogatories, with the certificate of the officer to whom the same had been delivered for taking, that the said party had refused to answer same, said officer being R. J. Griesenbeck, clerk of the district court of Bastrop county, Texas, as follows: (The questions are omitted.) "Which said *ex parte* interrogatories to Sam Ferris and Frank Ferris, parties plaintiff herein, are hereto attached, together with said commission and the return of said officer thereon, certifying the refusal of said parties to answer, as a part of this bill, and marked Exhibit 'A'. And thereupon the defendant moved the court that the said interrogatories be taken as confessed against each of said plaintiffs, Sam Ferris and Frank Ferris, and that the said Sam Ferris should not be permitted to testify upon the propositions covered by such interrogatories.

"That thereupon plaintiffs contended that under the act of the legislature of the State of Texas, approved April 22, 1897, where either party to the suit is a corporation, neither party is permitted to take *ex parte* interrogatories, whereupon the court sustained said contention and overruled the motion of defendant that said interrogatories be taken as confessed against said Sam Ferris, and overruled the motion of defendant that said Sam Ferris be not permitted to testify upon those propositions embodied in the interrogatories above set out. Whereupon the defendant excepted upon the ground that said statute of 1897 is contrary to and in conflict with the fourteenth amendment to the Constitution of the United States, in this, that it deprives the defendant corporation of the equal protection of the laws.

"That thereupon plaintiffs asked permission to introduce testimony to ascertain whether the refusal of the parties Sam Ferris and Frank Ferris was willful. That thereupon it was proven by said Sam Ferris that he was 14 years old and his brother Frank Ferris was 12 years old. That there-

upon the said R. J. Griesenbeck, the officer taking such depositions, testified as follows:

"Q. You are the clerk of this court?

"A. Yes, sir.

"Q. Did you undertake to execute a commission authorizing the taking of the depositions of Sam Ferris and Frank Ferris, parties plaintiff in this suit?

"A. Yes, sir.

"Q. The commission was issued in this court?

"A. Yes, sir.

"Q. Tell the court in your own way how you proceeded about it.

"A. I drove out to the place, about 5 miles, about 4 or 5 miles, and I drove up to the house, and one of the little boys, I don't know exactly whether that is the one or his brother, but one of them, came out to the gate and spoke to me, and I asked him his name, and he said, I think, Sam or Frank Ferris, I don't remember which. I could not say which one it was; it was one of them; it was the smallest one, and I asked him if his brother was there, and he said no, he had gone to the river, and about that time Mr. Klebe Trigg, the owner of the place where they reside, came up the road, and I spoke to him and shook hands with him, and I told him what I came for, and while hitching my horse he invited me in the house, and this little boy had gone off in the meantime, and as we walked up on the gallery to the house the little boy returned with his uncle, S. H. Gillespie, and I then talked to him, and this little boy again left, and while I was sitting there talking to Mr. Gillespie the boy returned with his brother. I told Mr. Gillespie what my business was there, and he said he could not permit me to ask him any question, or that he could (not) permit them to make any answer, and that he did that under instructions of his attorneys.

"Q. What did you do then?

"A. I just left.

"Q. Did you read a single interrogatory to either one of these boys and call upon them to give an answer to it?

"A. No, sir.

"Q. Did either one of them ever refuse?

"A. No, sir; I did not read the interrogatory.

"Q. Did either one of them ever refuse?

"A. No, sir; the uncle refused for them.

"Q. You did not turn and call on them?

"A. No, sir.

"Q. So they never directly refused?

"A. No, sir.

"Q. And you did not read a line to them?

"A. No, sir.

"On cross examination the witness, R. J. Griesenbeck, testified as follows:

"Q. That statement that they refused to answer on the advice of their attorneys that was made in their presence?

"A. Yes, sir.

"On redirect examination the witness, R. J. Griesenbeck, testified as follows:

"Q. About how old was that boy?

"A. Probably about 10 or 11 years old.

"Q. One was that old and how old was the other?

"A. I judged the other one to be about 12 or 13. Mr. Gillespie told me that he had seen no attorney, but that it was told him by Cass Ferris. He stated to me also that he would bring the boys to town that afternoon to see their attorneys, and then if there was no objection, Judge Garwood could ask him what he wanted to.

"Mr. Garwood—I desire to reserve my exception both under the State Constitution and under the fourteenth amendment to the Federal Constitution.

"And the court thereupon overruled the motion of defendant to take the interrogatories above set out as confessed, and thereupon overruled the motion of defendant that the said Sam Ferris should not be permitted to contradict, or

testify upon, the matters embraced in said interrogatories." (Rec. 38-41.)

And the said defendant in error, by counsel as aforesaid, also move the court to affirm the said judgment or decree, because, although the record in the said cause may show that this court has jurisdiction in the premises, yet it is manifest that the said writ of error was sued out for delay only.

Defendants in error pray that the writ of error may be dismissed with costs, or if the court should take jurisdiction then that the judgment be affirmed with ten per cent damages.

J. W. Carter,

Counsel for Defendants in Error for the purposes of these motions.